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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 635

LADUE & CO.,

Petitioner,

vs.

WILLIAM P. ROGERS, Attorney General, as Successor to the Alien Property Custodian,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Ladue & Co., Plaintiff-Appellant below, by its duly authorized attorney, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on October 13, 1958.

In support of this petition your petitioner respectfully shows:

OPINIONS BELOW.

The order of the District Court is not reported. It is set forth in the record (R. 316-318).

The opinion of the Court of Appeals printed in Appendix A hereto, *infra*, p. 1a, is reported in 259 F. 2d 905.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 13, 1958, Appendix A hereto, *infra*, p. 1a.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED.

1. Does the plaintiff in an action brought under Section 9 (a) of the Trading with the Enemy Act (50 U.S.C.A., App. sections 1, *et seq.*) have to establish that it is the beneficial owner of confiscated property where the admitted and undisputed facts conclusively show that the legal and beneficial ownership is in non-enemies?

2. Is not a trustee or fiduciary vested with sufficient right, title or interest to maintain an action for the recovery of confiscated property where the undisputed and uncontradicted evidence discloses that the beneficiary or beneficiaries are non-enemies?

3. Where the Alien Property Custodian makes a finding in a Vesting Order of enemy ownership between December 11, 1941 and January 1, 1947 and continuously to the date of vesting (April 13, 1953), does not the burden of proof shift to the Custodian to establish by a preponderance of evidence such finding where the undisputed evidence is that on the date of confiscation and prior thereto the complete legal and beneficial ownership was in admittedly non-enemies?

4. What is the meaning of the phrase, "right, title or interest" in Section 9(a) of the Trading with the Enemy Act?

5. Does not the reservation in the Joint Resolution of Congress of October 19, 1951 terminating the war with Germany limit the right to confiscate only in those instances where the preponderance of the evidence shows continuous enemy ownership from prior to 1947 down to and including the date of confiscation?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The Fifth Amendment to the Constitution of the United States provides:

> "No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C.A., App. Sec. 1, *et seq.* The relevant portions of this Act are appended to this petition as Appendix B hereto, *infra*, p. 8a.

3. Joint Resolution of Congress to terminate the state of war between the United States and the Government of Germany, approved October 19, 1951 (65 Stat. 451), appended to this petition as Appendix C hereto, *infra*, p. 10a.

4. White House Press Release in New York Times under date of April 18, 1953, appended to this petition as Appendix D hereto, *infra*, p. 11a.

STATEMENT OF THE CASE.

Petitioner is an Illinois corporation, engaged in buying, selling and distributing securities. It is the owner of Ten Certificates of Corporate Stock of the City of New York, Series W-17, and one St. Louis and Southwestern Railway Company mortgage bond.

On April 13, 1953, approximately a year and a half after the official termination of the war between the United States and Germany, and four days before the President of the United States by Executive Order abolished all future seizures, the respondent, as successor to the Alien Property Custodian, vested in himself, for the use of the United States, title to the above-mentioned securities and directed the payment to him of accruals thereon. (See Vesting Order No. 19266, R. 8-10).

Said Vesting Order reads, in part, as follows:

> "Re: Securities owned by unknown German nationals"; • • •
>
> "That the persons who *own* the property described in sub-paragraph 2 hereof, who, if individuals, there is reasonable cause to believe on or since December 11, 1941, and prior to January 1, 1947, *were* residents of Germany, and which, if partnerships, corporations, associations or other business organizations, there is reasonable cause to believe on or since December 11, 1941 and prior to January 1, 1947, *were* organized under the laws of and had their principal places of business in Germany, *are*, and prior to January 1, 1947, *were* nationals of a designated enemy country (Germany)." (Emphasis supplied)

On December 14, 1955 petitioner filed its complaint in the District Court of the United States for the Northern District of Illinois, Eastern Division, in which it alleged

that it is a citizen of the United States; that on and prior to April 13, 1953 it was the owner of the above described securities; that on said date respondent by his Vesting Order No. 19266 divested it of its title to said securities; that none of said securities on the date of vesting or immediately prior thereto were "owned or controlled, directly or indirectly, by an enemy, ally of an enemy, or a national of a designated enemy country (Germany), and that none of said securities has been owing or belonging to, or held on account of or for the benefit of any German national or any other enemy national"; that the respondent acted without right, power or authority in issuing his Vesting Order No. 19266 after the official termination of the war with Germany, and his action in divesting petitioner of its title to the aforesaid securities was a confiscation and taking of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, and beyond the authority granted by Article I, Section B, Clause 11 of the Constitution of the United States.

The complaint prayed that the respondent be ordered to revest in petitioner the title to the confiscated securities, and that he be required to account for and pay to petitioner all moneys received by him as income from said securities.

After a hearing on the merits the District Court made written Findings of Fact and Conclusions of Law. (R. 316-317).

The Conclusions of Law are as follows:

"1. In an action brought under Section 9(a) of the Trading with the Enemy Act (50 U.S.C.A., App. sections 1 *et seq.*) the plaintiff bears the burden of proof in establishing the right, title and interest sought to be recovered in the vested property.

2. It is not sufficient that the plaintiff establish that it is the agent of the owner, but it must establish that it is the beneficial owner of the interest sought to be recovered in the action.

3. The plaintiff, Ladue & Co., has failed to establish that it has any beneficial right, title or interest in the vested property involved in the action.

4. The plaintiff has failed to establish that it is entitled to any relief from the defendant, and this action should, therefore, be dismissed with prejudice."

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below erroneously construes the meaning of the phrase, "right, title or interest" contained in Section 9(a) of the Trading with the Enemy Act.

There is no requirement in Section 9(a) that the plaintiff in an action to recover vested property must establish his beneficial ownership. If such a construction were to be upheld by this Court a trustee or fiduciary for non-enemy beneficiaries would be barred from prosecuting or defending a suit. Many such suits have been prosecuted and defended in a representative capacity.

The term "beneficial owner" has been injected into some of the Trading with the Enemy Act cases where the plaintiff, having but a naked legal title, asserted a right to recover and where the court found that the custodian by a preponderance of the evidence conclusively established that the beneficial ownership was in an alien enemy.

That was the situation that existed in the case of *Feller v. McGrath*, reported in 106 F. Supp. 147. In that case the plaintiff sought to recover shares of stock in an American corporation vested in the Custodian by a vesting order finding that "the transfer of shares from a Ger-

man national to plaintiff was a cloaking transaction to protect the shares from seizure in event of war between the United States and Germany".

On page 156 the Court said:

> "In the instant action the defendant, as successor to the interest of SAG, has by *clear, precise and satisfactory evidence* established the fact that the money and property paid to the American corporation by Mr. Feller in consideration for the stock *belonged* to SAG and that it was paid to the American corporation with SAG's consent and at its direction. The burden of going forward with evidence to establish that the $50,000 was a loan or compensation rested upon plaintiff and he has failed to sustain that burden. Therefore, a resulting trust in the shares was established in favor of SAG." (Emphasis supplied)

On page 157 the Court said:

> "The burden of proof is on plaintiff to establish his claim; *Thorsch* v. *Miller, supra.* He must satisfy the court by a preponderance of evidence that he holds the full beneficial ownership. Here plaintiff proved *prima facie* that he had legal title to the stock in question. *The defendant then went forward with the evidence and shattered the weight of plaintiff's evidence—indeed, defendant proved by clear and satisfactory evidence that the German corporation was the beneficial owner of the stock.* Consequently, we find plaintiff did not establish his burden of proof, and plaintiff's record ownership of the stock is a simulacrum. See *Stoehr* v. *Wallace, supra.* (Emphasis added.)

The same situation existed in the case of *Beck* v. *McGrath,* 182 F. 2d 315, affirming 88 F. Supp. 565. There the Custodian by a preponderance of the evidence established that the real owner of the stock sought to be recovered was a German national.

That was also true in the case of *Thorsch* v. *Miller,* 5 F. 2d 118.

In the case of *Kaname Fujino* v. *Clark*, 172 F. 2d 384, the Court said, at page 385:

> "The District Court found that, although the record title stood in appellant's name, the beneficial ownership of the property was retained by Yotaro, and that, in holding the record title, appellant acted for and on behalf of Yotaro and was controlled by him. Thus, in effect, the record title was found to be a sham. The findings are supported by substantial evidence, are not clearly erroneous and hence are accepted by us as correct."

See also: *Cordero* v. *United States*, 111 F. Supp. 556; *Central National Bank of Cleveland, etc.*, v. *Herbert Brownell, Jr., etc., et al.*, 137 F. Supp. 686; *Central Hanover Bank & Trust Co.* v. *Markham*, 68 F. Supp. 829.

In every case brought against the Custodian for the recovery of vested property and where recovery was denied, the Custodian established by a preponderance of evidence his claim of enemy ownership.

The Court is requested to also bear in mind that all of the above-cited cases had to do with wartime seizures; they did not involve a seizure after the war was officially terminated and the Germans were no longer enemies.

In the instant case the Court of Appeals in its opinion states:

> "It is admitted that plaintiff is 'not an enemy or ally of enemy.' The same admission is made as to Brann and the Mexican firm, the latter a corporation of Mexico, an ally of this country in World War II." (App. A, *infra*, p. 4a).

Thus, by the Court's own admission, there is no question of enemy ownership involved. The sole and only ground of denial of recovery is that petitioner is not the proper

party to maintain the suit, although the uncontradicted evidence shows that it had a lien on the securities for its charges, had absolute title to them as against the world and the unrestricted right to sell, transfer or pledge them and give good title thereto, and that in collecting the income and disbursing the proceeds it would act as a fiduciary. The complete legal and beneficial ownership was admitted to be in petitioner, its sole stockholder, Brann, and Gibbon, Alonso y Cia., S.A., the Mexican corporation. At no time did the respondent make any attempt to prove that the confiscated property, or any part thereof, was owned by an alien enemy or someone acting for an alien enemy.

2. The decision of the Court below is in direct contravention of the express proviso of the Congress contained in the Joint Resolution of October 19, 1951 terminating the war with Germany. The proviso reads:

> "That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947 was subject to vesting or seizure under the provisions of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under the Act * * * shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been issued." (App. C, *infra*, p. 10a).

It is petitioner's contention that on and after October 19, 1951 the Custodian could only confiscate German property shown to be owned by the same German national from prior to January 1, 1947 continuously down to and including the date of confiscation. In other words, if a German national acquired property subsequent to Janu-

ary 1, 1947 and no seizure had been made prior to October 19, 1951, that property would not be subject to seizure.

This construction appears in the brief of the Custodian in the case of *Ladue & Company* v. *Brownell,* reported in 220 F. 2d 468.

In that brief the following language appears at pages 13, 14 and 15:

> "Plaintiff's attack on the Attorney General's Vesting Order ignores completely the proviso of the Joint Resolution of October 19, 1951. That Resolution did two things: (1) It terminated the war with Germany as of that date for most purposes; but, (2) it continued in effect after that date the authority of the Attorney General to vest under the Trading with the Enemy Act property in this country which, before January 1, 1947, was enemy owned and subject to vesting under the Act.
>
> "The Resolution distinguishes between property 'heretofore vested' and property which, prior to January 1, 1947, 'was subject to vesting'. The latter can only be German property which as of October 19, 1951 had not yet been vested although it could have been vested as enemy owned.
>
> "The plain language of the Resolution evidences the Congressional intention to reserve the power to vest pre-1947 German property which was 'subject to vesting'."

The right of seizure was thus limited to property enemy owned during the period December 11, 1941 to January 1, 1947 upon a showing of continuous ownership up to and including the date of seizure. That this was the interpretation of the Custodian is evident from an examination of the first paragraph of plaintiff's exhibit 12, appearing on page 249 of the record, in which he requested "the name, address and citizenship status from June 14,

1941 up to the present time (February 3, 1953) of the beneficial owner or owners of these bonds".

The Court below completely disregarded the language of the Congressional resolution in denying relief to petitioner. It also applied a strained construction to the term "right, title or interest" in construing these words to mean "beneficial ownership".

The term, "right, title or interest" has a well-defined meaning and embraces not only complete title or ownership, but also any kind of a claim, right or interest.

For example, a lessee has an interest in the demised premises although he has no title thereto.

One may have an easement over another's property without having any title thereto.

Corpus Juris Secundum, Volume 73, Sec. 15 at page 206, states

> "However, 'title' does not necessarily mean absolute ownership, and the term may mean possession or the right of possession. It is also used in the sense of right of possession as distinguished from the fact of mere possession, and in the sense of the evidence of one's right as distinguished from the actual beneficial ownership or right of interest in the property."

We desire to direct the Court's attention to the circumstances leading up to the issuance of Vesting Order 19266.

Sometime in the fall of 1952 petitioner made inquiry of the City Comptroller of the City of New York with reference to the status of certain bonds. Among the bonds listed were the Ten Certificates of Corporate Stock of the City of New York, Series W-17, described in Vesting Order 19266.

During World War II the Office of Alien Property issued thousands of blocking, freezing and vesting orders. No dealer in securities could safely buy or sell without first satisfying himself that there was no outstanding vesting order with respect to any particular security. In fact, these orders were issued with such frequency and in such large quantities that even though at the inception of a particular transaction no vesting or freezing order apparently was in existence, yet by the time the deal was consummated a vesting or freezing order could suddenly appear on the scene covering the particular security. Hence, the precautionary action of petitioner in making inquiry of the City Comptroller of the City of New York.

Apparently there was some liaison between the Office of Alien Property and the City Comptroller, because petitioner was immediately advised by the City Comptroller that he had forwarded its inquiry to the Office of Alien Property. Thereupon, the Office of Alien Property communicated with petitioner and its counsel and requested, "that you furnish this office with the name, address and citizenship status from June 14, 1941 up to the present time of the beneficial owner or owners of these bonds. Pending receipt of the foregoing information you were advised that no transfer or disposition should be made of these bonds.

> "* * * We wish to take this opportunity to inform you that pending receipt of the information requested in our letter of December 30, 1952 no transfer or disposition can be made of these 4¼% City of New York bonds. *In fact the issuer of such bonds has been placed on notice that no transfer, disposition or payment may be made of these bonds or of coupons detached therefrom if presented for payment*". (Rec. 249-250). (Emphasis supplied)

The first knowledge the Office of Alien Property had of the existence of these bonds was when it received notification from the City Comptroller of petitioner's inquiry. Thereupon, without any evidence in his possession that these securities were enemy tainted, the Alien Property Custodian immediately issued an order that no transfer or disposition could be made of these securities or any of the coupons paid. That was an arbitrary, unwarranted, unlawful and capricious act on his part and amounted to a confiscation of petitioner's property without due process of law. This unlawful, arbitrary and capricious act of the Custodian was followed up by the issuance of a vesting order approximately four months later, in which he alleged that these securities were owned by an "unknown German national."

We have heretofore called to the Court's attention that at no time during the trial of this cause did the Custodian ever attempt or make any attempt to introduce evidence to substantiate his claim of enemy ownership and the decision of the lower Court was bottomed solely upon the contention of the Custodian that even though it was conceded that all of the persons who had any right, title or interest in the confiscated securities and the proceeds thereof were non-enemies and that the Custodian could produce no proof of enemy ownership, nevertheless he could retain the confiscated property because, according to his contention, the proper party was not before the court.

The Custodian admitted that if the law of negotiable instruments were applied the petitioner, as the legal holder, would have absolute right to recover, but that since this was a proceeding under the Trading with the Enemy Act, the old and well-established principles of law pertaining to the rights of the holder of Bearer

securities were completely discarded and abrogated. It made no difference, according to his contention, that these securities were not enemy-owned, that he had no evidence of enemy ownership and the allegation in the Vesting Order that they were enemy owned was untrue; that even though there were absolutely no grounds for confiscation, the petitioner could not recover because it was not the beneficial owner.

The District Court and the Court of Appeals upheld the Custodian's position and thereby permanently deprived petitioner and its *cestuis* of their property and has caused them great loss and expense. The whole purpose of the Trading with the Enemy Act, which was to seize and sequester the property of enemies, has been perverted, distorted and abandoned and the confiscation of admittedly non-enemy property sustained.

The lower courts completely disregarded the case of *Gussfeldt* v. *McGrath*, 342 U.S. 308, in which this Court stated that the Trading with the Enemy Act not being a carefully matured enactment, it should not be literally applied but a wise latitude of construction should be adopted in enforcing its provisions. Instead, they have abandoned all principles of equity and justice and based their decisions on highly technical grounds which are absolutely unwarranted by a proper and reasonable construction of the language contained in the Act, the reservation in the Congressional resolution terminating the war with Germany, or in prior decisions.

Petitioner respectfully submits that to uphold the decisions of the District Court and the Court of Appeals would be inequitable, unjust and unconscionable.

CONCLUSION.

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

APPENDIX A.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12287 SEPTEMBER TERM AND SESSION, 1958.

LADUE & CO.,
Plaintiff-Appellant,
v.
WILLIAM P. ROGERS, Attorney General, as Successor to the Alien Property Custodian,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 13, 1958

Before MAJOR, SCHNACKENBERG and PARKINSON, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is an appeal from an order of the District Court dismissing on its merits, after trial, an action brought under Section 9 (a) of the Trading with the Enemy Act, as amended (40 Stat. 411, 50 U.S.C. App. Sec. 1 et seq.) (sometimes referred to as "the Act"). The action was for the recovery of certain bearer bonds which had been vested in the Attorney General under the authority of the Act.

Plaintiff, an Illinois corporation, is engaged in the business of servicing, on commission, securities sent it by various customers for sale and collection. Gibbon Alonso, a Mexican corporation (sometimes referred to as

"the Mexican firm") was one of LaDue's regular customers. One Herman W. Brann is the sole owner of all the stock of LaDue and also a vice president of the Mexican firm. He is a former Air Force officer whose business residence is the International Zone of Tangier, Morocco, with a legal residence in the City of Chicago.

The securities involved (bearer bonds issued by the St. Louis Southwestern Railroad Company and the City of New York) were sent by the Mexican firm to LaDue on or about December 15, 1952 and January 5, 1953, after LaDue was advised by Brann to request delivery from the Mexican firm.

On February 7, 1952 and April 13, 1953, the Attorney General of the United States, as successor to the Alien Property Custodian,[1] issued Vesting Order Nos. 18759 and 19266, respectively. By these orders he vested in himself for the benefit of the United States the obligations represented by the securities in question, after determining that they were property which, prior to January 1, 1947, was owned by persons who there was reasonable cause to believe were enemy nationals.

On July 27, 1954, LaDue filed a complaint in the District Court, seeking a return of the securities. The complaint was dismissed on motion for lack of jurisdiction. This Court affirmed, holding: (1) LaDue had failed to file a notice of claim with the Attorney General, as required by the Act, as a condition to bringing an action to recover vested property, and (2) the vesting of the property in question was constitutional. *LaDue & Company* v. *Brownell*, 200 F. 2d 468, cert. den. 350 U.S. 823.

On October 13, 1955, LaDue filed a notice of claim, in which it was stated, among other things, that the property involved had been transferred to it by the Mexican firm and that the nature and terms of such transfer were "for the purpose of collecting accrued interest and applying proceeds to adjustment of accounts." It was also stated in the claim that no consideration had been paid for the property and that there was to be

[1] By virtue of Executive Order No. 9788, October 15, 1946 (11 Fed. Reg. 11981, 3 CFR 1946 Supp. 169) the Attorney General succeeded to the functions and duties of the Alien Property Custodian.

paid "any balance that may hereafter become due and payable." On refusal of defendant to allow the claim, LaDue, on December 14, 1955, brought the instant action. In the complaint plaintiff alleged that it was the owner of the securities involved, which allegation was denied by defendant's answer.

The District Court, after trial, among other things found that plaintiff had possession at all times of the securities involved, after their transmission to it by the Mexican firm, but that plaintiff was only "the agent for the collection of the securities * * * that plaintiff has failed to establish who was the real and beneficial owner of the securities * * *," and that "plaintiff has failed to establish acquisition of any beneficial interest in the securities."

The Court concluded:

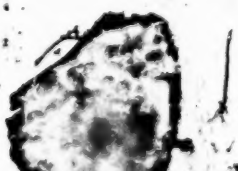
"1. In an action brought under Section 9 (a) of the Trading with the Enemy Act (50 U.S.C.A., App. sections 1 et seq.) the plaintiff bears the burden of proof in establishing the right, title and interest sought to be recovered in the vested property.

"2. It is not sufficient that the plaintiff establish that it is the agent of the owner, but it must establish that it is the beneficial owner of the interest sought to be recovered in the action.

"3. The plaintiff, LaDue and Co., has failed to establish that it has any beneficial right, title or interest in the vested property involved in the action."

Predicated upon such findings and conclusions, the trial Court, on January 3, 1958, entered its order dismissing the action on its merits. From this order plaintiff appeals.

Plaintiff asserts that the findings of the District Court relative to its interests in the securities involved are clearly erroneous. We disagree. The record discloses that they are amply supported. More than that, we agree that the conclusions of law are sound. As already shown, plaintiff in its claims for a return of the securities stated that they were received by it for the purpose of



collection. Mr. Shefner, the attorney and secretary of plaintiff, testified that the securities were received by plaintiff "with instructions to service them, collect the unpaid interest and to sell the same on the open market, as we did with most of the other securities." Mr. Johnson, another attorney for plaintiff, on March 31, 1953, wrote the Custodian that he understood the Mexican firm "are either the owners of all or part of the securities." On the same date, LaDue wrote the Deputy Director that the securities are owned by "Gibbon Alonso y Cia." Thus, it is plain from plaintiff's own evidence that it was not the real owner of the securities and that it, as agent, had title and possession only for the purpose of collection. In fact, there is no satisfactory proof as to who actually owned the securities. It might have been Brann, it might have been the Mexican firm from whom they were received by plaintiff, or it might have been some other party who placed them in the hands of the Mexican firm for collection.

The action was brought under Sec. 9 (a) of the Act, which provides in pertinent part as follows:

> "Any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property which may have been * * * seized by him [the Alien Property Custodian] hereunder * * * may institute a suit in equity * * * to establish the interest, right, [or] title * * * so claimed, and if so established the court shall order the payment * * * to said claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled."

It is admitted that plaintiff is "not an enemy or ally of enemy." The same admission is made as to Brann and the Mexican firm, the latter a corporation of Mexico, an ally of this country in World War II.

As grounds for reversal, plaintiff relies on two propositions: (1) that possession of bearer paper is prima facie evidence of title and sufficient to entitle the holder to sue thereon, and (2) that the burden was on the defendant to prove by a preponderance of the evidence

that the vested property was owned by an ascertained national of Germany on the date of Vesting Order No. 19266 (issued April 13, 1953).

In support of its first ground plaintiff cites a number of Illinois cases which hold that under the Negotiable Instruments Acts possession of bearer securities is sufficient to authorize the possessor to maintain an action against the obligor. Assuming that such is the law, the principle announced is without application and of no benefit to plaintiff in the instant matter. This action is brought under the Trading with the Enemy Act, a consent statute, and plaintiff's rights, if any, must be adjudicated in accordance with its provisions. Section 7 (c) provides:

> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian * * * shall be that provided by the terms of this Act * * *."

Thus, the remedy provided is exclusive. See *Tie[illegible]ann* v. *Brownell*, 222 F.2d 802, 804.

The cases appear to be harmonious that a plaintiff in an action under Sec. 9 (a) of the Act, as a prerequisite to the right to recover, must sustain the burden of proving that he is the real owner of the property or, as sometimes said, the beneficial owner. Mere title or possession is not sufficient. In *Feller* v. *McGrath*, 106 F.Supp. 147 (affirmed *Feller* v. *Brownell*, 201 F.2d 670), the Court stated (page 149):

> "Section 9 (a) of the Trading with the Enemy Act requires that a plaintiff 'establish' the 'interest, right, or title' he claims. This means plaintiff has the burden of establishing that he is the beneficial owner of the property involved. [Citing cases.] Beneficial ownership is the heart of the case; it is a part of plaintiff's *prima facie* case."

In *Kaufman* v. *Brownell*, 247 F.2d 553, 556, the Court stated:

> "Section 9 (a) of the Act provides that when the court in an equity action finds an individual claimant's interest has been established, it shall order the

'payment, conveyance, transfer, assignment, or delivery * * * of the money or other property * * * or the interest therein to which the court shall determine said claimant is entitled'; not the property or interest therein of some *other* claimant, or even of all claimants similarly situated, but of that to which *'said claimant'* is entitled, as established in the suit he instituted."

In *Kaname Fujino* v. *Clark,* 172 F.2d 384, it was held that plaintiff could not recover under Section 9 (a) by merely showing that he was the owner of the record title, that he must also prove that he was the beneficial owner.

As previously noted, plaintiff in its complaint made the allegation, essential we think, that it "was the owner of the securities involved." This allegation was denied by defendant. Thus, the burden was cast upon plaintiff to establish the material allegations of its complaint, including that of ownership. This, as shown, it failed to do, as tacitly conceded by plaintiff in its argument that title and possession were sufficient. The reason for the burden thus cast upon plaintiff is plain. Otherwise, the vesting order could be readily defeated and the purpose of the Act thwarted by the enemy holder of securities placing them in the hands of an American broker or other agency for collection. Aside from the provisions of the Act, there is nothing unreasonable about requiring the actual or beneficial owner to come into court and establish such ownership as a prerequisite to the right to recover from the Custodian.

There is even less merit in plaintiff's contention that a burden was cast upon defendant to prove that the vested property was owned by an ascertained national of Germany on the date of vesting. This contention is fully answered in *Becker Steel Company of America* v. *Cummings,* 296 U.S. 74, 79:

> "Section 7 of the Trading with the Enemy Act conferred on the Alien Property Custodian authority summarily to seize property upon his determination that it was enemy owned, and such a seizure was lawful even though the determination were erroneous. *Central Union Trust Co.* v. *Garvan,* 254 U.S. 554; *Stoehr* v. *Wallace,* 255 U.S. 239; *Commercial Trust*

Co. v. *Miller*, 262 U.S. 51. But in thus authorizing the seizure of property as a war measure Congress did not attempt the confiscation of the property of citizens or alien friends. See *Henkels* v. *Sutherland*, *supra*, 301. Instead by Sec. 9 (a) it gave to the non-enemy owner the right to maintain a suit for the recovery of the seized property or its proceeds, and at the same time, by the all-inclusive language of Sec. 7 (c) it denied to him any other remedy."

In addition to the cases cited in the quotation from *Becker*, see *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 11; *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120.

In our judgment, this case was decided correctly on its merits. We find no occasion, therefore, to consider defendant's contention that the Court erred in its refusal to dismiss the complaint on the ground that the action was barred by the limitations set forth in Sec. 33 of the Act.

The judgment appealed from is

AFFIRMED.

APPENDIX B.

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1, et seq.:

Sec. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business

(to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant, to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

APPENDIX C

Public Law 181 Chapter 519

(65 Stat., 451)

JOINT RESOLUTION

To terminate the state of war between the United States and the Government of Germany.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled. That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: Provided, however, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest.

Approved October 19, 1951.

APPENDIX D.

New York Times—April 18, 1953

U. S. End Confiscation of German Property.

Augusta, Ga. April 17—In a bid to strengthen the United States position in Germany the White House announced today there would be no further confiscation of German-owned properties located in the United States. This action was announced in advance of the return to Bonn of Konrad Adenauer, Chancellor of the German Federal Republic, who has been in Washington for conferences with President Eisenhower and other officials.

The White House announcement follows:

"The President announced the termination of the program for vesting German-owned properties located in the United States. This action constitutes a further step in the orderly conclusion of wartime measures inaugurated by the United States Government shortly after the outbreak of World War II.

"Attorney General [Herbert] Brownell stated that after April 17, 1953, the Department of Justice will not issue any orders vesting new or additional German properties. Secretary of State [John Foster] Dulles stated that the decision taken today represents one of a series of progressive steps looking toward the development of normal relations between the United States and the Federal Republic of Germany.

"Under the provisions of the Trading with the Enemy Act, enemy-owned properties in the United States at the outbreak of World War II were immediately immobilized and later vested. Immobilization prevented the enemy from using these assets to further its war effort, and by vesting these assets the United States Government obtained reparation for the payment of war claims."

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No. 685

In the Supreme Court of the United States

OCTOBER TERM, 1958

LADUE & CO., PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 635

LADUE & CO., PETITIONER

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–7a) is reported at 259 F. 2d 905.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1958 (App. 76)[1]. The petition for a writ of certiorari was filed on January 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "App." refers to the appendix in the Court of Appeals.

QUESTION PRESENTED

Whether Section 9(a) of the Trading with the Enemy Act authorizes the recovery of vested property by a claimant which fails to establish that it is the beneficial owner thereof.

STATUTE INVOLVED

Section 9(a) of the Trading with the Enemy Act is set forth at pages 8a–9a of the petition.

STATEMENT

This action was brought under Section 9(a) of the Trading with the Enemy Act (40 Stat. 411, as amended, 50 U.S.C. App. 9(a)) ("the Act"), to recover certain bonds which had been vested by the Attorney General. The District Court dismissed the complaint on the ground that petitioner had not established that it was the beneficial owner of the bonds; the Court of Appeals unanimously affirmed.

Petitioner is engaged in the business of servicing, on commission, securities sent to it by various customers for collection and sale of amounts due thereon (App. 44; Pet. 1a). Gibbon Alonso y Cia, S.A, a Mexican corporation ("the Mexican firm"), was one of petitioner's regular customers. Herman W. Brann is the sole owner of all the stock of petitioner and also is a vice-president of the Mexican firm (App. 44–45; Pet. 1a–2a).

The securities here involved (bearer bonds issued by the St. Louis Southwestern Railroad Company and the City of New York) were sent at Brann's direction by the Mexican firm to petitioner in December 1952 and January 1953 (App. 44–45; Pet. 2a). Mr. Shef-

ner, petitioner's attorney and secretary (App. 44; Pet. 4a), testified that the securities were received by petitioner "with instructions to service them, collect the unpaid interest and to sell the same on the open market, as we did with most of the other securities" (App. 46; Pet. 4a). Mr. Johnson, another attorney for petitioner, wrote the Attorney General on March 31, 1953, that he understood the Mexican firm "are either the owners of all or part of the securities." On the same date, petitioner wrote that the securities are owned by "Gibbon Alonso y Cia." (Pet. 4a).

On February 7, 1952, and April 13, 1953, the Attorney General, as successor to the Alien Property Custodian,[2] vested the obligations represented by the securities in question (App. 30–35). He found that they were property which, since December 11, 1941, and prior to January 1, 1947, was owned or controlled by persons who were enemy (German) nationals (*ibid.*).

In December 1955 petitioner, alleging that at the time of vesting it "was the owner" of the bonds (App. 3), filed this action for their return.[3] After trial, the District Court dismissed the complaint (App. 62).

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[2] Under Executive Order No. 9788, October 15, 1946 (11 Fed. Reg. 11981, 3 CFR 1946 Supp. 169), the Attorney General succeeded to the functions and duties of the Alien Property Custodian.

[3] Petitioner's prior complaint, seeking the same relief, was dismissed because it had not then filed with the Attorney General a notice of claim which, under the Act, must be filed as a condition to maintaining an action for return of vested property, *Ludue & Co.* v. *Brownell*, 220 F. 2d 468 (C.A. 7), certiorari denied, 350 U.S. 823. Petitioner then filed a notice of claim, and instituted this action (Pet. 2a-3a).

The court held (*ibid.*) that in order to recover vested property in a suit under Section 9(a) of the Act, it is "not sufficient that the plaintiff establish that it is the agent of the owner, but it must establish that it is the beneficial owner of the interest sought to be recovered"; and it found (App. 61) that petitioner, who was merely "the agent for the collection of the securities," had "failed to establish (1) who was the[ir] real and beneficial owner" or (2) "acquisition of any beneficial interest" therein.

In unanimously affirming, the Court of Appeals ruled (Pet. 5a) that under the decisions "a plaintiff in an action under Sec. 9(a) * * *, as a prerequisite to the right to recover, must sustain the burden of proving that he is the real owner of the property or, as sometimes said, the beneficial owner. Mere title or possession is not sufficient." The court held (Pet. 3a) that the District Court's findings that petitioner had failed to establish the beneficial ownership of the bonds are "amply supported" by the record. It stated (Pet. 4a):

> [I]t is plain from plaintiff's own evidence that it was not the real owner of the securities and that it, as agent, had title and possession only for the purpose of collection. In fact, there is no satisfactory proof as to who actually owned the securities. It might have been Braun, it might have been the Mexican firm from whom they were received by plaintiff, or it might have been some other party who placed them in the hands of the Mexican firm for collection.

ARGUMENT

The decision of the Court of Appeals that petitioner is precluded from recovering the vested property because of failure to show that it is the beneficial owner thereof is clearly correct,[4] and no question calling for further review is presented.

Section 9(a) of the Act requires a claimant of vested property to establish "the interest, right, title * * * so claimed." As the Court of Appeals correctly held (Pet. 5a), under this provision it is settled that it is "not sufficient" for the claimant to show "[m]ere title or possession." He must also establish that he is the "beneficial owner" (*ibid.*) of the property. *Stoehr* v. *Wallace*, 255 U.S. 239, 246; *Beck* v. *Clark*, 88 F. Supp. 565 (D. Conn.), affirmed *sub nom. Beck* v. *McGrath*, 182 F. 2d 315 (C.A. 2); *Farmers' Loan & Trust Co.* v. *Hicks*, 9 F. 2d 848, 853 (C.A. 2), certiorari denied, 269 U.S. 583; *Kaname Fujino* v. *Clark*, 172 F. 2d 384 (C.A. 9), certiorari denied, 337 U.S. 937; *Thorsch* v. *Miller*, 5 F. 2d 118 (C.A.D.C.); *Feller* v. *McGrath*, 106 F. Supp. 147 (W.D. Pa.), affirmed *sub nom. Feller* v. *Brownell*, 201 F. 2d 670 (C.A. 3), certiorari denied, 346 U.S. 831; see *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 482.[5]

[4] Although petitioner repeatedly states (Pet. 2, 9, 13, 14) that the "undisputed and uncontradicted" evidence shows that the beneficial ownership is non-enemy, both courts below found that the beneficial ownership had not been established.

[5] In certain situations where the claimant necessarily could not be the beneficial owner, such as that of a trustee, it may recover upon showing that the beneficial owners are non-enemies. *Cordero* v. *United States*, 111 F. Supp. 556, 558 (S.D.N.Y.), affirmed *sub nom. Cordero* v. *Brownell*, 211 F. 2d 90 (C.A. 2); see, also, *Rogers* v. *Maron*, 257 F. 2d 622, 624 (C.A.D.C.), certiorari denied, 358 U.S. 839.

Petitioner failed to establish either that it was the beneficial owner of the bonds, or, indeed, who such owner was. As the court below stated (Pet. 4a), "there is no satisfactory proof as to who actually owned the securities. It might have been Brann, it might have been the Mexican firm from whom they were received by plaintiff, or it might have been some other party who placed them in the hands of the Mexican firm for collection."

Petitioner argues (Pet. 6–9, 13), however, that since it was lawfully in possession of the bonds (as agent for their collection), the burden was on the Attorney General to prove that they were in fact enemy owned or controlled. But under such a rule, as the Court of Appeals pointed out (Pet. 6a), "the vesting order could be readily defeated and the purpose of the Act thwarted by the enemy holder of securities placing them in the hands of an American broker or other agency for collection." See *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 485. If petitioner were the beneficial owner of the securities, and not merely their custodian, it could have so shown. As the court below stated (Pet. 6a), "there is nothing unreasonable about requiring the actual or beneficial owner to come into court and establish such ownership as a prerequisite to the right to recover from the Custodian."*

* A proviso to the Joint Resolution of October 19, 1951 (65 Stat. 451), which terminated the war with Germany, stated that any property which prior to January 1, 1947, was subject to vesting or seizure under the Act would continue to be subject to the Act "in the same manner and to the same extent as if this resolution had not been * * * issued." Petitioner contends (Pet. 9) that under this proviso enemy property could not be

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1959.

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vested after October 19, 1951, unless it were "shown to be owned by the same German national from prior to January 1, 1947 continuously down to and including the date" of vesting. On its face, however, the proviso does not so provide; on the contrary, its stated purpose was to continue the Government's right to vest enemy property "in the same manner and to the same extent" as theretofore.

U. S. GOVERNMENT PRINTING OFFICE 1959